NO. 80209-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CECIL DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frederick W. Fleming Judge

REPLY BRIEF OF APPELLANT

ERIC J. NIELSEN
DAVID B. KOCH
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206)623-2373

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (Cont'd)

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (Cont'd)

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (Cont'd)

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (Cont'd)

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (Cont'd)

FEDERAL CASES

TABLE OF CONTENTS (CONT'D)

Page

FEDERAL CASES (Cont'd)

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (Cont'd)

OTHER JURISDICTIONS

TABLE OF CONTENTS (CONT'D)

Page

RULES, STATUTES AND OTHER

TABLE OF CONTENTS (CONT'D)

Page

RULES, STATUTES AND OTHER (Cont'd)

A. ARGUMENTS IN REPLY

1. JUDGE FLEMING WAS REQUIRED TO RECUSE HIMSELF AFTER VIOLATING THE CODE OF JUDICIAL CONDUCT.

The State concedes Judge Fleming improperly engaged in ex parte communications with prosecutors, thereby violating the Code of Judicial Conduct. BOR[1] at 21. The only question remaining is whether a reasonable person might reasonably question Judge Fleming's impartiality. See State v. Sherman, 128 Wn.2d 164, 205-206, 905 P.2d 355 (1995). The answer is yes.

Under Sherman, the hypothetical "'reasonable person knows and understands all the relevant facts.'" Sherman, 128 Wn.2d at 206 (quoting In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1312 (2nd Cir. 1988)). In its brief, the State acknowledges this standard but discusses few of the circumstances leading up to October 24, 2006. See BOR at 20, 22. Judge Fleming's CJC violations did not occur in a vacuum. "All the relevant facts" necessarily include the following:

- Even before the CJC violations, the defense did not believe Davis could get a fair trial before Judge Fleming and attempted to remove him [CP 603];

[1] Citations to the Opening Brief of Appellant are referred to as BOA and citations to the Brief of Respondent are referred to as BOR.

- On remand, Judge Fleming minimized the seriousness of the shackling issue that led to the new penalty trial – noting the death sentence had been affirmed on appeal but was then reversed because jurors "may have seen somebody walking in shackles" [RP (1/20/06) 10];

- Judge Fleming was well aware that defense counsel were new to the case, had nearly 100,000 pages of materials to review for trial (2 to 3 times the discovery in a typical capital case) and also were devoting significant time to a new mitigation package, collecting and reviewing three times the material prior counsel used [RP (4/29/05) 5, 9; RP (11/18/05) 5];

- Judge Fleming was anxious about the delay necessary for defense counsels' trial preparation, noting the case had been on his calendar since 1997 and it had been eight years since Davis was originally sentenced to death [RP (1/20/06) 10; RP (11/03/06) 12];

- Only with great reluctance did Judge Fleming give defense counsel the final, nine-month extension necessary to prepare for trial. RP (1/20/06) 6-11, 18-19; RP (11/3/06) 14; CP 944. The defense made it clear that in light of the holidays, it did not want to start trial until after New Year's Day, and Judge Fleming agreed, setting the date for January 8, 2007. Judge Fleming also promised his personal schedule would not interfere with that date [RP (1/20/06) 16];

- Despite these assurances, and the fact Judge Fleming had not checked on defense counsels' progress since January 2006, in October 2006 he decided to accelerate the start of trial by more than a month to accommodate a personal vacation and because he felt the defense should have been ready the previous April [RP (11/3/06) 8, 15, 17; CP 621-22, 637-38, 656];

- This change made it impossible for Davis to get a fair trial. Neither the defense attorneys nor the defense experts were prepared to proceed under the accelerated schedule. CP

626-628, 630-31, 633-34. The new date made it impossible to comply with Superior Court Special Proceeding Rule 5, governing notice of mental health experts. CP 627. Moreover, the mitigation package had not yet been presented or considered. CP 635-36;

- Despite the serious consequences to Davis and the defense team, Judge Fleming only contacted the trial deputies from the Pierce County Prosecutor's Office when ordering the new trial date, inviting them into his private chambers to draft and sign the order [CP 638, 657];

- Prosecutors did not object to the ex parte contact or to the continuance, despite defense counsels' absence and the order's impact on Davis' ability to prepare his defense [CP 622];

- When confronted with his improper conduct, which clearly met the definition of ex parte, Judge Fleming refused to acknowledge he had done anything wrong [RP (11/3/06) 13-14; CP 947].

In light of these circumstances, a reasonable person would question Judge Fleming's impartiality. In *any* case, much less a death penalty case, an impartial judge does not contact and direct prosecutors to chambers so they can draft an order making it impossible for the defendant to receive a fair trial. The context in which the decision was made adds, rather than quells, suspicion concerning Judge Fleming's impartiality. Judge Fleming's ultimate justification – he felt the defense should have been prepared back in April 2006 – shows little recognition or concern for Davis' rights in the eyes of an objective observer.

The State emphasizes there is nothing in the record indicating Judge Fleming and the deputy prosecutors engaged in a discussion regarding whether the date for trial should be changed. BOR at 22. This is true. It is also true, however, that prosecutors knew the enormity of defense counsels' task in preparing for trial. They knew they had not yet received the mitigation package. And they knew not to engage in ex parte contact with the judge. See RPC 3.5(b) (a lawyer shall not engage in ex parte contact with a judge). Yet, they did not object to the ex parte contact and then drafted and signed the order.

Citing Sherman v. State and In re Discipline of Sanders, 159 Wn.2d 517, 145 P.3d 1208 (2006), the State contends that a judge's impartiality cannot be reasonably questioned unless the judge seeks information pertaining to an issue before the court. Because Judge Fleming did not seek the prosecutors' input on changing the trial date, argues the State, there is no problem here. BOR at 24.

While the judges in Sherman and Sanders did seek information that could have been unfair to one party in the litigation, there is nothing in either case that limits recusal to that circumstance. And the State has not explained the logic behind its proposed limitation. Improper contact seeking information that *could* result in a perceived advantage to one party

on an issue before the court (Sanders and Sherman) is far less disturbing than improper contact that absolutely denies one party a fair trial (Davis).

Continuing with a theme developed below, the State emphasizes that it did not ask Judge Fleming to accelerate the trial date. BOR at 23. But there is no collusion requirement. The focus is on Judge Fleming. Judge Fleming chose to accelerate the trial date without concern for its impact on Davis. And Judge Fleming chose to engage in ex parte contact with prosecutors to make it happen.

The State's argument that it did not benefit from the new trial date, the defendant did not suffer from it, and "[t]he court's action affected each party equally" is nonsense. BOR at 23, 25. Pierce County Prosecutors had handled the case since 1997. Defense counsel Ness and Cross were not involved with Davis' first trial. The prosecution accurately described them as "two brand new attorneys who are not familiar with the case." RP (1/14/05) 15; see also RP (4/29/05) 8 (Prosecutor Neeb points out that unlike defense counsel, he and Judge Fleming had already tried this case). Prosecutors could be ready for trial on any date set by the court. RP (1/20/06) at 14-15 (indicating they could be ready for an April 2006 trial date and did not want a further continuance for themselves).[2] For that

[2] Indeed, the only concern prosecutors ever expressed regarding the timing of trial was that it occur after Davis' trial in another

reason, prosecutors signed off, without objection, on the ex parte order accelerating Davis' trial. It made no difference to them. See CP 622. Accelerating the trial date only denied a fair trial to one party: Cecil Davis.

Finally, the State points to Judge Fleming's order continuing trial, filed after the ex parte contact and defense motion for recusal, as proof of his impartiality. BOR, at 25. But Judge Fleming had no choice in the matter because the defense could not be ready by the new start date. Even the prosecution was conceding Judge Fleming's contact with them was improper and encouraged him to continue trial, thereby making it more difficult for the defense to claim actual prejudice from the contact. RP (11/03/06) 6-10. This does not show impartiality. By vacating the accelerated trial date, Judge Fleming simply avoided turning one reversible error (refusing to recuse himself) into two reversible errors (a patently unreasonable acceleration of trial).

Based on Judge Fleming's ex parte order accelerating Davis' trial date, an objective observer – with knowledge of all the circumstances – would be concerned that Judge Fleming was prone to disregard Davis'

---

murder case because they hoped to use his conviction in that case as evidence in the penalty trial. RP (4/29/05) 11 ("My primary goal, Judge, from the beginning, has been to make sure this penalty phase happens after a jury determination of that second degree murder because that's something that the jury should be entitled to consider in the penalty phase if there is a conviction that happens.").

rights and the needs of his counsel. The observer would reasonably question his impartiality, particularly since this was a death penalty case, requiring the greatest care and caution to ensure a fair proceeding. Judge Fleming was required to recuse himself from the case.

2. THE COURT ERRED IN EXCLUDING TWO PROSPECTIVE JURORS.

a. Juror 39

A trial court's decision to remove a juror for cause is reviewed under the abuse of discretion standard. State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061 (1988). A trial court abuses its discretion if its decision rests on facts unsupported in the record or was reached by applying the wrong legal standard. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Prospective juror 39 heard from her husband that Davis was seen in leg irons in his previous trial and that influenced the decision of a jury member. The trial court chose to exclude the prospective juror because it was concerned its failure to do so could possibly result in reversible error based on speculation about what this Court might decide. RP 870-71.

The State contends the trial court was justified in disqualifying the juror for cause because this Court reversed Davis' prior sentence where a juror in that proceeding saw Davis in leg irons. BOR 35-38 (citing In re

Davis, 152 Wn.2d 647, 705, 101 P.3d 1 (2004)). In support of its argument, the State cites RCW 4.44.170, which provides in part that a prospective juror may be removed for cause "[fo]r the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias." RCW 4.44.170(2); BOR at 33. The statute does not help the State.

First, the statute refers to the "challenged person." Here, neither party challenged juror 39's qualifications nor questioned her ability to be fair or impartial. The trial court specifically found juror 39 was "intelligent, could be fair to both sides, would listen to the evidence and make a conscientious decision based on the evidence." RP 871. Moreover, there was no legal basis for the court to believe that absent either party challenging the juror for cause, and given the nature and extent of the juror's information, there would have been reversible error if it did not sua sponte dismiss the juror. See State v. Castilla, 131 Wn. App. 7, 13, 87 P.3d 1211 (2004) ("We first note that jury selection is a matter of trial strategy, and is largely left to the judgment of counsel. While there may be situations in which a court is justified in interfering with this

process sua sponte, it will very rarely, if ever, be error to fail to do so" (emphasis added)).

Second, in Davis, this Court reasoned Davis was prejudiced because the juror there saw Davis' shackles and might have concluded the judge believed Davis was dangerous, which could have influenced the juror's decision on whether he was too dangerous to be imprisoned and thus warranted the death penalty. In re Davis, 152 Wn.2d at 705. Here, however, Davis was not shackled, juror 39 did not see Davis shackled, that Davis' sentence was reversed because of the shackling issue is a matter of public record, and the juror never wavered in assuring the court that information would not effect her impartiality. The record does not show prospective juror 39 was in any way influenced by what she heard much less that she could not be impartial.

Third, speculation about what an appellate court might decide is not the correct legal standard for dismissing a prospective juror for cause. The correct standard is whether the juror cannot be impartial. RCW 4.44.170(2). The decision to remove juror 39 for cause on nothing more than speculation that this Court might view leaving her on the jury as error is the wrong legal standard. See State v. Kinneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005) (a trial court abuses its discretion if it bases its

decision on an erroneous view of the law or applies an improper legal standard).

The State further claims the decisions in Yount[3] and Rupe are distinguishable because here, by removing the prospective juror for cause, the trial court "acted to protect the defendant's right to a fair and impartial jury" where in those cases the trial courts failed to remove the prospective juror. BOR at 39-40. Those cases, however, stand for the proposition that a prospective juror's knowledge of what occurred at the prior proceeding is insufficient alone to show the juror is biased. The record must show the juror could not try the issue impartially. Yount, 467 U.S. at 1035; Rupe, 108 Wn.2d at 750.

The record and the trial court's findings affirmatively show juror 39 would have been fair and impartial. The claim the trial court's decision to remove the juror was to protect Davis' right to a fair and impartial jury finds no logical or evidentiary mooring, especially where neither the State nor the defense challenged juror 39. See State v. Adams, 147 Idaho 857, 861-862, 216 P.3d 146 (2009) ("We are of the view that trial courts should not be required or encouraged, in any but the most extreme circumstances

[3] Patton v. Yount, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984).

to interfere with legitimate tactics of counsel by excusing for cause a juror who has not been challenged by either party.").

If, as held in Yount and Rupe, it is not an abuse of discretion to fail to remove a prospective juror for cause solely because the juror has information about a prior proceeding involving the defendant without any evidence showing bias because of that information, then it is logically an abuse of discretion to remove a prospective juror for the same reason.

The State argues that if the trial court erroneously excluded the prospective juror the error was harmless, citing Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), and claims under Ross the error was harmless because Davis has not shown the jurors that eventually sat on the panel were not fair and impartial. BOR at 40-41. Ross is both factually and legally distinguishable and is not controlling.

In Ross, the defendant argued his constitutional rights were violated when he was forced to use peremptory challenges to exclude prospective jurors who appeared to favor the death penalty. The Ross Court "reject[ed] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." Ross, 487 U.S. at 88. The Court held that, "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Id.

The issue in Davis' case is not whether Davis lost a peremptory challenge because he had to use a peremptory challenge to remove a juror who should have been removed for cause. The issue is the effect erroneous removal of a prospective juror had on the proceeding. Because that effect cannot be known, the error is structural and reversal is required.

Whether an error may be harmless requires the reviewing court to determine whether the error is a classic trial error or a structural error. Arizona v. Fulminante, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). An error is structural and never harmless when it affects the framework within which the trial proceeds, rather than simply an error in the trial process itself. Fulminante, 499 U.S. at 310. A trial error subject to harmless error analysis is one which occurs during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. Id. at 307-08. Structural errors, however, are defects in the constitution of the trial mechanism, which defy analysis by harmless error standards. Id. at 309.

The error here is similar to other structural errors involving jury selection. In State v. Vreen, 143 Wn.2d 923, 927, 26 P.3d 236 (2001), for example, this Court held that the erroneous denial of a peremptory challenge, resulting in the juror sitting on the panel, is structural error. In

doing so, the Court recognized that, short of taping jury deliberations, there was no way to determine the impact of improperly seating the juror. Vreen, 143 Wn.2d at 930-31. In State v. Evans, 100 Wn. App. 757, 998 P.2d 373 (2000), the court held an impairment of a party's right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. "As such, harmless error analysis does not apply." Evans, 100 Wn. App. at 774 (citing United States v. Annigoni, 96 F.3d 1132, 1136-1137 (9th Cir. 1996)). In a death penalty case, the Supreme Court has held it is structural error and reversal is required where a prospective juror is erroneously dismissed for cause because of scruples about the death penalty. Davis v. Georgia, 429 U.S. 122, 97 S. Ct. 399, 50 L. Ed. 2d 339 (1976); Gray v. Mississippi, 481 U.S. 648, 668, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987) (improper for cause removal of juror in death penalty cases structural error).

It is impossible for a defendant to show how an erroneous removal for cause of a prospective qualified juror may have affected the jury panel and the verdict. Likewise, it is impossible for the State to show the erroneous removal of a juror did not affect the panel and the verdict. Jurors reach a verdict through a deliberative process. During that process each juror has the opportunity to convince the others on the proper verdict using whatever persuasive skills that juror can muster. Moreover, a death

sentence requires the jury to unanimously agree there are not sufficient mitigating circumstances to warrant leniency beyond a reasonable doubt. RCW 10.95.060(4); RCW 10.95.080. An improperly removed juror might find the State did not prove beyond a reasonable doubt insufficient mitigating circumstances warranted leniency and might convince other jurors as well.

The trial court erroneously removed prospective juror 39 for cause. Any attempt to divine how the juror's removal affected the jury panel or verdict defies analysis in the same way a denial of a peremptory challenge or the erroneous exclusion of a juror based on his views on the death penalty defies analysis. The error here is structural and reversal of Davis' death sentence is required.

b. Juror 1

The State argues the record supports the trial court's finding that juror 1's "views about the death penalty would have substantially impaired her ability to follow the court's instructions." BOR at 32. The State, however, admits the juror "did not have philosophical opposition to the death penalty on an abstract level" but instead claims on a "practical level she could not vote for a death verdict." Id. In support of its argument the State cites to answers the juror gave in response to questions by the court

and counsel that indicate she had strong personal feelings about making a decision to sentence a person to death. BOR at 30-32.

A strong personal feeling about a decision to sentence a person to death is not the standard for excluding a prospective juror. The standard is whether the juror can follow the law. A trial court may dismiss a juror for cause only if the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)). "Under the Witt test, a juror may express scruples about capital punishment, or even personal opposition to the death penalty, so long as he or she can ultimately defer to the rule of law." State v. Gregory, 158 Wn.2d 759, 814, 147 P.3d 1201 (2006).

The State further supports its argument by drawing analogies to people who might believe in the nobility of certain professions, like a soldier or law enforcement officer, but who lack the "courage needed to pursue such a calling." BOR at 32. While there may be such individuals, the analogy does not work in the context of excluding a juror in a capital case. That a person may not have the "courage" to pursue a potentially life threatening profession is different than the question of whether a person has the ability to follow the law. A more apt analogy is a person

may not have the courage to pursue a career as a soldier but if drafted to fight he follows orders even though those orders put him in harm's way.

Juror 1 expressed misgivings about sentencing a person to death. She did not, however, express misgivings about following the law. When questioned, she affirmed she could perform her duty as a juror, despite her personal misgivings about imposing the death penalty. RP 332, 353. It is the inability or unwillingness to defer to the court's instructions on the law that renders a person unfit to serve as a juror in a capital case and not her personal views or feelings about the death penalty. See Lockhart v. McCree, 476 U.S. 162, 176, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986) (jurors who believe that the death penalty is unjust may serve as jurors in capital cases if they are willing to temporarily set aside their own beliefs in deference to the rule of law).

This Court has held that some deference is given to a trial court's finding that a prospective juror's views would prevent the juror from impartially applying the law because the trial judge is in a position to see and hear the prospective juror. Gregory, 158 Wn.2d at 813-814 (citing Witt, 469 U.S. at 426). Here, the record shows the trial judge did not base his decision on the prospective juror's demeanor but instead on her responses to questions. RP 368-69. Juror 1, while scrupulously honest about her feelings when questioned, never wavered in her responses to

questions about whether she could follow the law. On this record, the Court abused its discretion when it excluded prospective juror 1. Thus, Davis' death sentence should be reversed. Gray v. Mississippi, 481 U.S. at 659-60.

3. THE INFORMATION FROM DAVIS' AUNTS ABOUT DAVIS, HIS BACKGROUND, AND HIS FAMILY HISTORY WAS RELEVANT, RELIABLE, AND NOT CUMULATIVE.

The State correctly concedes that in a death penalty case "claims of error at the sentencing phase are given more searching scrutiny because the death penalty is qualitatively different from all other punishments." BOR at 41; Gregory, 158 Wn.2d at 849 (citing State v. Benn, 120 Wash.2d 631, 648, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993)). The State also recognizes that a capital defendant has a right to present relevant mitigating evidence regardless of whether the evidence is admissible under evidence rules. BOR at 41 (citing RCW 10.95.060(3) and State v. Bartholomew, 101 Wn.2d 631, 645, 683 P.2d 1079 (1984) (Bartholomew II)).

The State contends, however, the recorded interview of Davis' two paternal aunts, Eula Brooks and Lillie Jones, was properly excluded because the evidence was irrelevant, unreliable and cumulative. BOR at 43. The State's contentions are legally and factually unsupported.

The State cites Bartholomew II for the broad proposition that "the due process and cruel punishment clause of the state constitution are offended when evidence is admitted in a penalty phase without regard to evidence rules." BOR 43. That claim and the citation to Bartholomew II are misleading. The Bartholomew II Court held those clauses of the state constitution were offended by the admission of aggravating factors contrary to the rules of evidence. Bartholomew II, 101 Wn.2d. at 640-641; see also In re Brown, 143 Wn.2d 431, 458, 21 P.3d 687 (2001) (admission of evidence of aggravating factors must meet evidentiary and constitutional standards). A statute or an evidentiary ruling cannot bar consideration of mitigating evidence. State v. Finch, 137 Wn.2d 792, 863-64, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999).

A defendant in a death penalty sentencing proceeding has the statutory and constitutional right to introduce any evidence of mitigating circumstances that might merit leniency or that in fairness and mercy may justify a less severe punishment or serve as a basis for a sentence less than death. State v. Pirtle, 127 Wn.2d 628, 671, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). The bar for admission of mitigating evidence is low. Only evidence that is so unreliable that it has no

probative value at all can be excluded at the sentencing phase.[4] Rupe v. Wood, 93 F.3d 1434, 1440 (9th Cir.) cert. denied, 519 U.S. 1142 (1997).[5]

The State understandably fails to mention the trial court excluded the evidence, in part, because it was only "minimally relevant." RP 3057. Even if the testimony were only "minimally relevant" it was nonetheless admissible. "The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible." Gregory, 158 Wn.2d at 835 (citing, State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)).

In the interview, Davis' aunts discuss his troubled youth, family history, mental problems suffered by his paternal grandmother, his abnormality, his mother and father's neglect, and the poverty he suffered as a child. BOA at 52-53. These are relevant circumstances in determining whether to spare a defendant's life. Eddings v. Oklahoma, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982); see also Penry v. Lynaugh, 492 U.S. 302, 328, 109 S. Ct. 2934, 2951-52, 106 L. Ed. 2d 256 (1989) (jury must be able to consider any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime),

---

[4] Ironically the State clings to the "significantly relaxed" relevancy standard and the "low standard" for admission of mitigating evidence in arguing the trial court properly admitted Sergeant Davidson's rebuttal testimony. BOR at 51.

[5] Evidence is probative if it tends to prove or disprove a point in issue. Black's Law Dictionary (seventh edition, 1999) at 579.

abrogated on other grounds, Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). The record belies the State's argument the evidence was not relevant.

The State ignores the relevant parts of the interview and instead argues the entire interview was irrelevant because the two women also spoke about their own upbringing and how they would have tried to help Davis if they had known how much difficulty he had in school. BOR at 45. That information was not irrelevant but contextual. But, even if some of the information provided by Davis' aunts was not relevant, the State could have requested the trial court redact those parts of the interview. The redaction of inadmissible testimony from admissible testimony is not uncommon and is appropriate. See State v. Redmond, 150 Wash.2d 489, 497,78 P.3d 1001 (2003) (trial court abused its discretion when it refused to redact inadmissible parts of a medical record from admissible parts); see also State v. Green, 119 Wn. App. 15, 24, 79 P.3d 460 (2003), review denied, 151 Wn.2d 1035, cert. denied, 543 U.S. 1023 (2004) (plea agreement provision requiring truthful testimony should be redacted upon request because it improperly vouches for a witness' credibility). Even assuming for the sake of argument that some information was irrelevant, instead of excluding wholesale the relevant portions, the trial court was obliged to redact that information.

The State also argues the evidence was properly excluded because it was unreliable. In support of its unreliability claim, the State, citing ER 603 and ER 612, points out Davis' aunts were not put under oath and did not testify in person and the State did not get the opportunity to cross examine them. BOR at 44. The law does not support the argument.

The Bartholomew II Court held "when a jury is faced with the question whether or not the defendant should be put to death, the defendant should be allowed to submit any evidence of his 'character or record and any of the circumstances of the offense' . . . to convince the jury that his life should be spared." Bartholomew II, 101 Wn. 2d at 646-47 (quoting Lockett, 438 U.S. at 604). The requirement that a witness testify under oath is an evidence rule. ER 603. The scope of the State's ability to cross examine a witness is within the court's discretion and is also rule based. ER 611(b). A capital defendant has a right to present relevant mitigating evidence regardless of whether the evidence is admissible under evidence rules. Bartholomew II, 101 Wn.2d at 645. That the prosecutor did not have the opportunity to cross examine the two women in the courtroom does not justify exclusion of their mitigation evidence.

Furthermore, the State does not support its unreliability contention with facts or evidence. There is nothing in the record to suggest the

information given by Davis' aunts is "unreliable." The two women speak about Davis' family history, a family they belong to, their personal knowledge of Davis and his life, and their feelings about Davis being sentenced to death. If the record even hinted the information was unreliable, the State would have pointed that out in its argument.[6]

Moreover, evidence considered too unreliable to be admissible in a criminal trial is nonetheless admissible in the penalty phase of a capital case if relevant. "The rules of evidence designed to ensure the reliability of evidence received by the court do not apply to mitigating information in a capital sentencing proceeding." State v. Bartholomew, 98 Wn.2d 173, 197, 654 P.2d 1170 (1982) (Bartholomew I), vacated by 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983), aff'd on remand, 101 Wn.2d 631, 683 P.2d 1079 (1984). For example, the results of polygraph tests are not recognized as reliable evidence and are inadmissible without stipulation from both parties. State v. Renfro, 96 Wn.2d 902, 905, 639 P.2d 737, cert. denied, 459 U.S. 842 (1982). Nonetheless, they are admissible in the penalty phase of a capital case without a stipulation if the examiner is qualified and subject to cross examination. Bartholomew II, 101 Wn.2d at 646.

---

[6] In fact, as discussed below, the State argues that much of the evidence is cumulative of that provided by other defense witnesses, necessarily undermining any reliability challenge.

The State also contends the trial court properly excluded the information given by Davis' aunts because the information was cumulative. BOR at 46. While Davis' mother (Cozetta Taylor) and sister (Connie Cunningham) generally testified about Davis' struggles at school and the beatings he suffered at the hands of his stepfather, they did not testify about his father, his paternal family and its history, including its history of mental illness, or how both his mother and father neglected him. Davis' aunts would have supplied that information. See BOA at 52-54. Additionally, they expressed their concern for Davis and the belief he should be institutionalized instead of put to death. Ex. 226-228. The relevancy of that is made all too clear by the State's closing argument telling jurors that although Davis has a large family, they only heard from two members in support of Davis. RP 3519.

It is understandable some of the information provided by different witnesses that touch a person's history and background will overlap because that kind of information is generally factual. But, merely because there is some overlap does render the additional information or a different perspective on the same information cumulative.

The only statutory and legal limitation on the right to present mitigating evidence is that the evidence is minimally relevant. RCW 10.95.060(3); State v. Gregory, 158 Wn.2d at 835. The information from

Davis' aunts meets that test. The information was relevant and probative on the ultimate issue, whether there was anything about Davis or his personal history that would convince a juror to spare his life. It is the jury and not the judge that is the ultimate arbiter of the weight given to potentially mitigating evidence. See Ortiz v. Stewart, 149 F.3d 923, 943 (9th Cir. 1998) (a jury asked to decide whether a person should live or die cannot be foreclosed from considering relevant mitigating evidence but is free to assess how much weight to assign such evidence); see also Eddings, 455 U.S. at 114-15 ("The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.").

The jury should have been allowed to consider the information from Davis' aunts along with all the other relevant evidence and assign whatever weight to that information it believed was appropriate. As the trial court noted, Davis' aunts' information would have had a positive impact. RP 3057. The exclusion of the evidence denied Davis his right to fair sentencing hearing and requires reversal of his death sentence. Skipper v. South Carolina, 476 U.S. 1, 6-8, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

4. THE TESTIMONY FROM THE STATE'S REBUTTAL WITNESS WAS IRRELEVANT AND THE WITNESS WAS UNQUALIFIED TO TESTIFY ON THE SUBJECT OF DAVIS' MENTAL IMPAIRMENTS.

The State argues Sergeant Davidson's testimony was proper and relevant to rebut the testimony of the mental health experts who agreed Davis suffers from cognitive impairment, major mental illness, and personality disorder. BOR at 52-53. The State's argument is summed up in its statement: "His [Davidson's] testimony that the defendant was calm, rational and completely coherent within just a few days of Mrs. Couch's murder was relevant to the jury's determination about whether any of the mental problems described by the defense witnesses were in fact mitigating of his conduct that night." BOR at 53. That is a mischaracterization of Davidson's testimony. His testimony was much more than merely telling the jury Davis was calm, rational, and coherent when he spoke with police.

Davidson said that during the police interview Davis never exhibited any signs he didn't understand the conversation and he gave appropriate responses to questions. RP 3465. Davidson also testified about his experiences and observations dealing with criminal suspects and that he uses his own "scale" in determining their mental health. RP 3461. He told the jury that if he believed a person booked in jail might be

suffering from a mental problem, he had the ability to request the person be seen by a mental health professional. RP 3462-3463. Davidson told the jury that in his experience people who failed to finish high school were more intelligent than expected (Davis did not finish high school). RP 3459-3460. And, he was allowed to tell the jury that he did not question Davis' mental health. RP 3465-3466.

Davis argued in his opening brief that Davidson's rebuttal testimony was irrelevant because Davis never presented any evidence regarding his inability to understand interview questions or that his responses to interview questions were inappropriate. Davis also argued that Davidson's testimony was improper and irrelevant because it was an opinion on Davis' mental status and, not only was Davidson unqualified to give such an opinion, to the extent his opinion was based on his own "scale" derived by his experiences with other people, it was irrelevant to rebut the evidence of Davis' impaired mental abilities. BOA at 64-65 (citing ER 701, ER 702, Medcalf v. Dep't of Licensing, 133 Wn.2d 290, 310, 944 P.2d 1014 (1997), Ashley v. Hall, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999) and State v. Farr-Lenzini, 93 Wn. App. 453, 460-461, 970 P.2d 313 (1999)).

The State does not address any of these arguments. Instead, it argues, without citation to any authority, that given the "low standard" for

admission of mitigating evidence, it is entitled to an unspecified degree of "latitude" in presenting rebuttal evidence. BOR at 51. Its argument and failure to address Davis' arguments implies, if not admits, Davidson's testimony had little, if any, rebuttal relevancy and was improper.

Additionally, only if the probative value of the rebuttal evidence outweighs the prejudicial effect should the evidence be admitted. State v. Bartholomew I, 98 Wn.2d at 194. The State concedes the trial court failed to conduct the required balancing test. BOR at 53. It contends, however, that any prejudice was minimized "by the fact that the defendant was before this jury already convicted of murder" and that he denied involvement to the police. BOR at 53-54.

An appellate court assumes the trial court would not have admitted the evidence if the trial court had properly conducted the balancing and then asks whether the evidence affected the outcome within reasonable probabilities. State v. Russell, 104 Wn. App. 422, 434-435, 16 P.3d 664 (2001). An evidentiary error is given more searching scrutiny because the death penalty is qualitatively different from all other punishments. State v. Benn, 120 Wash.2d at 648. "Unlike the guilt phase, the prejudice to the defendant during a special sentencing proceeding cannot necessarily be overcome by objective and overwhelming evidence." State v. Finch, 137 Wn.2d at 862-863 (citing Eddings v. Oklahoma, 455 U.S. at 112 (quoting

Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)).

That Davis was convicted of murder merely states the obvious and is irrelevant to determining whether the admission of the improper evidence was prejudicial in this sentencing trial where the issue was whether Davis would live or die. The evidence considered during the special sentencing proceeding is subjective, dealing with not only the nature of the crime but with personal history and the character of the defendant. State v. Finch, 137 Wn.2d at 863. Davis' mental health was the heart of his mitigation evidence. The improper testimony allowed jurors to conclude that if a seasoned police officer comparing Davis with other criminal suspects did not have any concerns about Davis' mental impairments, it was likely those impairments were insufficient mitigating circumstances and death was the appropriate punishment. Under the heightened scrutiny standard, the impermissible rebuttal evidence was prejudicial and Davis' sentence should be reversed.

5. FAILURE TO GIVE DAVIS' PROPOSED INSTRUCTION NO. 5 DENIED DAVIS HIS RIGHT TO A FAIR SENTENCING PROCEEDING.

Davis has nothing new to add in response to the State's argument and he rests on his opening brief. See BOA at 67-72.

6. PROSECUTORIAL MISCONDUCT DENIED DAVIS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO HAVE THE JURY CONSIDER ALL MITIGATING EVIDENCE AND TO A FAIR TRIAL.

a. Misconduct Denied Davis His Eighth and Fourteenth Amendment Rights to Have The Jury Consider All Mitigating Evidence, Including Mercy and Compassion.

The opening brief argues that the State improperly told jurors they could consider compassion "where it belongs" – with the victim and her family – but could not consider compassion in deciding whether to spare Davis' life, thereby preventing consideration of both compassion and mercy for Davis. See BOA at 73-86. In response, the State addresses only a portion of this complaint and expresses confusion about "what the defendant's claim could be." BOR at 65.

There should be no confusion. Under established United States Supreme Court precedent, the Eighth and Fourteenth Amendments to the United States Constitution require that jurors be permitted to consider compassion and mercy when deciding a defendant's fate. The trial deputy told Davis' jurors they could not consider compassion when deciding whether to spare his life because it was an emotion. This is wrong. Moreover, since compassion means mercy, the prosecutor also necessarily precluded consideration of mercy. This is wrong. In addition, the trial

deputy said jurors could only consider compassion for Ms. Couch and her family. This also was wrong.

The State makes three claims. Notably, it does not cite a single case or other legal authority for any of them.

First, the State contends that its argument was "legally correct" and "[t]he specific wording used should never be as important as the message conveyed." BOR at 65. Here, however, both the specific words *and* the message were incorrect. The prosecutor said "compassion is an emotion," it was not found anywhere in the jury instructions, and jurors were forbidden to consider it (unless they were focused on Mrs. Couch and her family). There is simply no way to reconcile this argument with Woodson's requirement that jurors consider all "compassionate factors" in deciding a defendant's fate. Woodson v. North Carolina, 428 U.S. at 304. Moreover, the State has not explained why, if compassion is purely an emotion, the trial deputy could properly tell jurors to have compassion for Mrs. Couch and her family. It appears compassion is only an emotion when directed at Davis.

Second, the State argues that the deputy's argument was "grammatically correct," pointing out that "compassion" is listed as one of many synonyms for "sympathy." BOR at 66 (citing Webster's). But synonymous words do not necessarily have precisely the same meaning.

They can differ in "connotation, application, or idiomatic use." Webster's Third New Int'l Dictionary 2320 (1993). And the United States Supreme Court has recognized a distinction between compassion and sympathy. While Woodson makes it clear jurors must consider any compassionate factors, the Court has indicated jurors may be instructed not to consider "sympathy," which is based on purely emotional responses not rooted in the evidence. Saffle v. Parks, 494 U.S. 484, 492-495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990); California v. Brown, 479 U.S. 538, 542-543, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987). This Court has drawn a similar distinction between mercy and sympathy. See In re Rupe, 115 Wn.2d 379, 388-391, 397-398, 798 P.2d 780 (1990).

Ultimately, while mercy and compassion undoubtedly involve some emotional element, they are associated – in capital cases – with reasoned discretion rooted in the evidence. In contrast, sympathy implies a purely emotional reaction. While it is appropriate to tell jurors not to base their verdict on sympathy, or any other pure emotion, it is not permissible to tell them not to base their verdict on compassion, which *is* mercy.

Finally, the State argues that because there was no defense objection to the prosecutor's misconduct, it is subject to the harmless error standard applicable to *non*-constitutional violations raised for the first time

on appeal. BOR at 66. As discussed in Davis' opening brief, however, closing argument in violation of the defendant's constitutional rights (here, the Eighth and Fourteenth Amendments) requires reversal unless the State can prove the offending remarks were harmless beyond a reasonable doubt.[7] See BOA at 83-84 (citing State v. Warren, 165 Wn.2d at 26 n.3; State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997)); see also State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) (misconduct violating Fifth Amendment subject to harmless beyond a reasonable doubt standard); State v. Davenport, 100 Wn.2d 757, 761-762 n.1, 675 P.2d 1213 (1984) (when misconduct violates a separate constitutional right

---

[7] Despite Davis' argument in his opening brief that the trial deputy's argument violated his constitutional rights under the Eighth and Fourteenth Amendments, the State does not discuss in its brief whether the constitutional harmless beyond a reasonable doubt standard applies to this misconduct. Instead, it simply applies the "flagrant and ill intentioned" standard. See BOR at 61, 66. In State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.2d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009), this Court acknowledged the possible application of the constitutional test where, for example, a prosecutor directly violates a defendant's Fifth Amendment right to silence by pointing out that the defendant had exercised that right. Such a situation is indistinguishable from Davis' case. While the Eighth and Fourteenth Amendments guaranteed him the jury's consideration of all mitigating factors – including compassion and mercy – the trial deputy expressly told jurors they could not consider compassion, thereby precluding mercy as well. This was a direct violation of constitutional guarantees.

beyond the right to a fair trial, it is subject to the stricter standard of constitutional harmless error); State v. Moreno, 132 Wn. App. 663, 671-673, 132 P.3d 1137 (2006) (constitutional standard applied to improper comment involving right of self-representation); State v. Johnson, 80 Wn. App. 337, 341, 908 P.2d 900, review denied, 120 Wn.2d 1016 (1996) (constitutional standard applied to improper comment involving right to be present and confront witnesses), overruled on other grounds, Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000); State v. Fiallo-Lopez, 78 Wn. App. 717, 728-729, 899 P.2d 1294 (1995) (constitutional standard for comment on failure to testify); State v. Traweek, 43 Wn. App. 99, 107-08, 715 P.2d 1148 (constitutional standard for comment on failure to testify or present evidence), review denied, 106 Wn.2d 1007 (1986), overruled on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

Jurors were instructed they should disregard any argument in conflict with the law given to them by the court. CP 929, 1159; RP 62. Had "mercy" been defined for jurors in the court's instructions, they would have known that it meant "compassion or forbearance shown to an offender or subject : clemency or kindness extended to someone instead of strictness or severity . . . ." Webster's Third New Int'l Dictionary 1413 (1993). Under that circumstance, it would be easier for the State to argue

the trial deputy's contrary statements – that jurors were forbidden from considering compassion for Davis – were harmless beyond a reasonable doubt.

But the court gave no instruction defining "mercy" or otherwise addressing compassion. And jurors also were instructed that the attorneys' arguments were intended to help them apply the law. CP 929, 1159; RP 62. Thus, jurors would have been looking to the attorneys for guidance and had no reason to question the trial deputy's assertions they were forbidden from considering compassion for Davis. In short, where there was no instruction defining mercy and no instruction telling jurors compassion was a proper consideration, the State cannot make a plausible harmless error argument. Nor does it try.

Mercy and compassion were Davis' only hope of receiving a life sentence. By forbidding jurors' consideration of compassion for Davis (although encouraging it for Mrs. Couch and her family), the trial deputy precluded consideration of compassion and mercy. This was a direct violation of Davis' rights under the Eighth and Fourteenth Amendments and denied him a fair penalty trial.

b. While Removing Mercy and Compassion From Consideration, Prosecutors Also Misstated the Evidence, Argued Facts Not In Evidence, Played On Jurors' Passions In Violation of the Eighth and Fourteenth Amendments, and Denied Him a Fair Trial.

In his opening brief, Davis identified multiple instances of prosecutorial misconduct: (1) creating a fictional script of conversations between Davis and Mrs. Couch, which portrayed him as particularly evil and cruel, in an attempt to convince jurors Davis did not deserve mercy; (2) contrasting the constitutional rights Davis enjoyed with the total absence of similar rights he provided Mrs. Couch; (3) contending Mrs. Couch was still alive when Davis scrubbed her vagina with an abrasive pad; (4) resorting to a "golden rule" argument, not based on the facts and presented in an inflammatory manner, asking jurors to do unto Davis as he did to Mrs. Couch; and (5) improperly denigrating the defense evidence by arguing it was not properly considered in deciding the existence of a mitigating circumstance that could spare Davis' life.

The State has chosen to respond to some, but not all, of these complaints.

i. *Fictional script*

The State seeks to justify its invented dialogue between Couch and Davis as reasonable based on inferences from the evidence. BOR at 67-

68. Notably, the State does not include a single citation to the record indicating where this evidence might be found in the trial record. Rather, the State relies on a general notion that "when a smaller, older woman is being savagely attacked by a bigger, younger man, that attack including burglary, robbery, rape, and murder, she will try to do anything she can to stop her attacker, including physically struggling and verbally communicating[.]" BOR, at 67.

But there is no evidence indicating to what extent, if any, Mrs. Couch resisted Davis, who was much bigger and much younger. All we know is that she was attacked after Davis entered the home, she suffered serious injuries, including an injury in the one of the bedrooms, and she died in the bathtub. There is no indication she was even capable of resisting, physically or verbally, after the initial attack.

Moreover, even it is reasonable to conclude there was some verbal communication between Davis and Couch thereafter, *nothing* suggests what was said. Yet the deputy prosecutor described Couch repeatedly begging and pleading for Davis to stop at several locations throughout the home. RP 3536 (while being dragged upstairs); RP 3537 (in a hallway); RP 3537 (in the master bedroom); RP 3538 (in the bathroom). The prosecutor even provided her probable words. RP 3536 ("Leave me alone. Take whatever you want. Take anything you want, just leave me alone,

leave my house."); RP 3537 (" Please let me go. Please don't hurt me anymore. I'll do anything you want. Just stop."); RP 3538 ("Have mercy on me.").

The prosecutor also provided Davis' words, going so far as to suggest he lied to Couch to obtain her cooperation before killing her in the tub. RP 3512 ("He may very well have promised her that if she got in the tub and got cleaned up so that the evidence was gone, he would let her live."); RP 3538 ("You know what, cooperate with me here and I'll let you live.").

Arguing that Mrs. Couch may have fought and told Davis to stop is one thing. But the prosecutor's description of events in the house and his dialogue goes well beyond reasonable inferences from the available evidence. It is no different than the misconduct criticized by the Florida Supreme Court in Urbin v. State, 714 So.2d 411 (1998). And it was particularly damaging in Davis' case because the prosecution used its fictitious portrayal to convince jurors they should deny him his only chance for life – mercy. RP 3535-3536 (arguing the photos and video of the scene "don't really give you . . . what happened" and asking jurors to focus on these missing details "when we talk about whether or not this defendant should be shown any mercy whatsoever."); RP 3539 ("And so, when you decide how much mercy or whether to show mercy to this

defendant, you should consider those final few minutes of Yoshiko Couch's life on this earth.").

According to the State, prosecutor Neeb holds the distinction of the only Washington prosecutor to commit misconduct resulting in reversal of a death sentence. See BOR at 68 ("only one time has a death sentence been reversed for prosecutorial misconduct in closing argument"). In State v. Gregory, 158 Wn.2d at 864-867, Mr. Neeb relied on evidence outside the record – the amenities in prison available to Gregory if he received a life sentence – and this Court reversed despite the absence of a defense objection. The misconduct in Davis' case is far worse. Moreover, Gregory served as a warning to Mr. Neeb that he must stay within the confines of the evidence when seeking the penalty of death, further supporting a finding that his actions in Davis' case were both flagrant and ill-intentioned.

ii. Contrasting Davis' constitutional rights with the absence of similar rights for Mrs. Couch

As discussed in the opening brief, the deputy prosecutor focused jurors on the constitutional rights Davis enjoyed:

> Justice for a defendant means that they receive due process of law, representation by counsel, the right to confront witnesses, that they have a fair and impartial jury, and that they receive a fair trial. Cecil Davis had every single one of those things.

RP 3500. The prosecutor then contrasted these with the absence of due process Davis provided Couch:

> The only similarity between murder and the death penalty is that death results. But, there are significant differences. This defendant enjoyed all of the rights I have talked to you about. Mrs. Couch had not rights. The defendant was her judge, jury, and executioner; no due process, no trial, no chance to present mitigation.

RP 3502.

In its brief, the State does not address this misconduct. In Davis' direct appeal, this Court found no misconduct where the prosecutor argued that Davis had acted as the "judge, jury and executioner of the victim." State v. Davis, 141 Wn.2d 798, 873, 10 P.3d 977 (2000). Perhaps emboldened by that ruling, prosecutors decided to take the argument to the next level at Davis' retrial, comparing the legal rights of the defendant and his victim as part of its golden rule argument. This is impossible to justify.

The Florida Supreme Court's decision in State v. Bertolotti, 476 So.2d 130, 133 (Fla. 1985), demonstrates why this argument is misconduct. Not only was it part of the State's improper golden rule argument – suggesting jurors treat Davis as he treated Couch – "the exercise of legal rights must not be used to enhance statutory aggravating factors." Bertolotti, 476 So.2d at 133 (citing Pope v. State, 441 So.2d

1073, 1077 (Fla. 1983) (prosecutors cannot imply defendant should be punished for exercising rights of due process)).

This Court has imposed a similar prohibition, noting the "well-established rule that constitutional behavior cannot be the basis of criminal punishment." State v. Rupe, 101 Wn.2d 664, 704, 683 P.2d 571 (1984). "To protect the integrity of constitutional rights . . . [t]he State can take no action that will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." Id. at 705 (citing state and federal cases). In Rupe, this Court reversed the defendant's death sentence because prosecutors had used his ownership of guns (protected under the Second Amendment) to draw adverse inferences while asking jurors to sentence him to death. Id. at 707.

This Court has permitted golden rule arguments so long as they are based on the evidence and do not encourage imposition of the death penalty on improper grounds. State v. Rice, 110 Wn.2d 577, 605-609, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). In Davis' case, however, the prosecution improperly suggested jurors should show Davis the same "rights" he showed Couch in a manner that penalized the

exercise of his own constitutional trial rights.[8] This violated due process and was reversible error.

iii. *Arguing Ms. Couch was still alive when Davis scrubbed her vagina with an abrasive pad*

Without any factual basis, the prosecution argued that Mrs. Couch was still alive when her vagina was scrubbed with an abrasive pad. See RP 3574 ("he put her in the bathtub, degraded her with no clothing on the bottom, scrubbed her vagina, and then he suffocated her."). The State does not acknowledge, much less discuss, this prejudicial misstatement of the evidence. Like much of the prosecutors' closing arguments, it improperly portrayed Davis as particularly evil and cruel.

iv. *This Court never approved the golden rule argument made at Davis' penalty phase retrial*

The State responds to Davis' claim that prosecutors strayed far from the evidence and presented its golden rule argument in an

---

[8] In his opening brief, Davis argued all of the misconduct discussed in this section – like the prosecutors' statements jurors could not consider compassion – is subject to the constitutional harmless beyond a reasonable doubt standard. See BOA at 91. As previously noted, the State has chosen not to acknowledge the existence of this more rigorous standard. Given the prosecutor's use of Davis' trial rights to argue for his death, this appears to be precisely the type of constitutional error this Court suggested in Warren would be subject to a constitutional standard of review. See State v. Warren, 165 Wn.2d 17, 26 n.3.

inflammatory and highly prejudicial manner by claiming this Court expressly approved its tactics:

> The defendant claims the State committed misconduct when it suggested the jury show the same quantity of mercy to the defendant that he showed Mrs. Couch. This exact same argument was heard and rejected by this court, in what might be said to be irony, in this defendant's direct appeal from the first time a jury sentenced him to death. *See* **Davis**, 141 Wn.2d at 873.

BOR, at 71.

But the argument this Court considered in Davis' prior appeal was as follows:

> "There are certain murders where we must say no mercy is appropriate. . . . The defendant, he was merciless to Ms. Couch. *You might consider showing him mercy in the same quality and degree and amount he showed her.*" Report of Proceedings (Feb. 12, 1998) at 2515-16 (emphasis added).

Davis, 141 Wn.2d at 873. This Court properly found *that* argument "did not inflame the jury." Id. This Court did not, however, give prosecutors the green light to create a fictional dialogue between Davis and Mrs. Couch, argue facts not in evidence, misstate other evidence, or penalize the exercise of Davis' due process rights by comparing them to what Mrs. Couch received.

v. *Improperly denigrating the defense mitigation evidence by arguing it was not properly considered*

Prosecutors argued that evidence of Davis' background and psychological problems was not "true mitigation" evidence; rather these were "excuses" designed to make jurors feel sorry for him, which was forbidden under the court's instructions. RP 3524-25, 3529, 3555-3569. In Urbin, the Florida Supreme Court found a similar argument to be misconduct. Urbin, 714 So.2d at 422 n.14.

The problem with this argument, of course, is that Davis' personal background and mental health history are indeed "true mitigation" evidence. Jurors were instructed:

> A mitigating circumstance is a fact about either the offense or about the defendant which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense.

CP 1165. The State bears the burden to prove beyond a reasonable doubt the absence of sufficient mitigating circumstances to warrant leniency. CP 1163-1164.

Nothing prevented prosecutors from arguing that given the circumstances of the crime, jurors should find Davis' history did not extenuate or reduce his moral culpability and did not justify a sentence less than death. But to argue that the defense evidence was not true

mitigation evidence, but rather "excuses" designed to evoke forbidden emotions, is simply wrong. Prosecutors' arguments left jurors with nothing to consider in Davis' favor.

c. The "If Not" Arguments Were An Improper Appeal To The Jury To Decide Davis' Fate Based On Passion, Fear and Evidence Outside The Record.

In the opening and closing arguments, both prosecuting attorneys asked the jurors "If not now, then when? And if not Cecil Davis, then who?" in extolling them to sentence Davis to death. RP 2364, 3492. The State claims the argument is virtually identical to the "worst of the worst" argument the same prosecutor made in Gregory. BOR at 72. The State's reliance on Gregory is misplaced.

In Gregory, the trial court excluded as mitigating evidence information about other capital defendants and their crimes, which the defense proffered to show the class of crimes for which the death penalty should be reserved. Gregory argued on appeal that excluding that evidence but allowing the prosecutor to argue Gregory was the "worst of the worst" violated his right to due process because he was not given the opportunity to deny he was the "worst of the worst." Gregory, 258 Wn.2d 855-857. This Court rejected that argument.

The Gregory Court, however, noted that to the extent the argument also implied prosecutorial misconduct, because Gregory failed to object,

the argument was analyzed under the flagrant and ill-intentioned standard of review. This Court found the argument was not flagrant and ill intentioned:

> Finally, Gregory asserts that the State essentially argued facts not in evidence by claiming Gregory fit into the category of "the worst of the worst" without comparing the facts of his crime with other murders, especially those for which the defendant has been sentenced to death. This argument amounts to a claim of prosecutorial misconduct, and the defense failed to object to this argument. We cannot find the State's statement so flagrant and ill intentioned that it created an enduring prejudice at the penalty phase.

Gregory, 158 Wn. 2d at 858.

Here, unlike Gregory, Davis objected to the argument and his objection was overruled. Thus, the standard on review is whether the comments were improper and prejudicial. Gregory, 158 Wn.2d at 858.

Moreover, contrary to the State's assertion, the comments "If not now, then when? And if not Cecil Davis, then who?" is significantly different than the "worst of the worst" comment. In addition to referring to evidence outside the record, it was an emotional appeal to the jurors, who all believed the death penalty is an appropriate punishment for certain crimes, that if they did not sentence Davis to death it would send a message to society that the death penalty was no longer an available sentencing option. It played on jurors' fears that they would be personally

responsible for ensuring the death penalty was not an available sentence for anyone regardless of how heinous the defendant or crime.

The State chides Davis for ignoring the context in which the argument was made. It cites the statement made by the prosecuting attorney in opening argument preceding the "if not" comments as showing the comment was confined to the issue of Davis' punishment. BOR at 72.[9] That statement does not help the State. The prosecutor told the jury that it would decide what punishment is appropriate and that it "should also keep two questions in mind as the case proceeds along." RP 2364. In couching the argument in terms of what the jury "should also" consider, the prosecutor conveyed the message that the answers to the "if not" questions were separate from what might be the appropriate punishment. The message was clear – that if not now "never" and if not Davis "nobody."[10]

Although prosecutors are given latitude in drawing inferences from the facts, a prosecutor's argument should be free of appeals to passion and prejudice, and be confined to the evidence. State v. Belgarde, 110 Wn.2d

---

[9] The State, however, does not make the same "context" argument regarding the prosecutor's closing argument where the prosecutor used the same rhetorical questions.

[10] Jurors are not told the appellate court conducts an independent proportionality review because it is constitutionally impermissible to lead jurors to believe the responsibility for determining a defendant's death rests elsewhere. Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

504, 507, 755 P.2d 174 (1988). The prosecutor's comments here were an appeal to sentence Davis to death based on fear and emotion rather than evidence. The comments also referred to facts outside the record because they implied Davis and his crime were worse than other capital defendants and their crimes.

The improper comments could have swayed a juror to vote for death despite the mitigating evidence because the juror was afraid if the death penalty were rejected, no matter how heinous the crime or regardless of the defendant's depravity, the death penalty would never again be a sentencing option. Thus, Davis was prejudiced by the improper comments.

d. The "Remorse" Argument Was A Comment On Davis' Failure To Testify And Right To Remain Silent.

The State argues the prosecutor's remorse argument was not a comment on Davis' right to remain silent or failure to testify because "every time the State discussed remorse, it set out facts presented to the jury during the penalty phase hearing." BOR at 75. It then posits that the logical conclusion of Davis' argument would preclude the State from discussing the "actions of the defendant during the crime . . . ." Id. The State either misapprehends Davis' argument or chooses to ignore it.

Davis does not contend the State is prohibited from arguing reasonable inferences from the evidence or discussing the crime. The problem is the State's remorse argument was not a reasonable inference because remorse is a reflective emotion or feeling. A person feels remorse for an action taken and not while taking the action. It is a "a gnawing distress arising from a sense of guilt for past wrongs." Webster's Third New International Dictionary 1921 (2002). The circumstances of the wrong, or in this case the crime, have nothing to do with whether the person committing the wrong or crime feels remorse.

In State v. Fiallo-Lopez, 78 Wn. App. 717, 728-729, 899 P.2d 1294 (1995), the court held it was an impermissible comment on a defendant's right to silence where the defendant is the only person who could have offered an explanation to a question posed by the State in closing argument. There the prosecutor argued there was no evidence why the defendant was at the locations where a drug transaction took place. Because the defendant was the only person who could provide that explanation, the court found the argument was a comment on his right to silence. Id.

Because remorse is a reflective emotion, whether a person feels remorse can only be shown by the person's post-wrong or post-crime deeds or words. In this case Davis is the only person who could have told

the jury, or someone else, by actions or words, whether he felt remorse or lack of remorse for what he had done. Thus, a reasonable person would logically conclude the prosecuting attorney's argument was an indirect and impermissible comment on Davis' failure to testify or speak about his feelings about committing the crime. Like the prosecutor's argument in Fiallo-Lopez, the prosecutor's argument here violated Davis' constitutional rights to due process and silence.

The State contends because the prosecutor's argument was not a direct comment on Davis' right to silence, it is evaluated under the non-constitutional harmless error standard. BOR at 74 (citing State v. Romero, 113 Wn. App. 779, 790-792, 54 P.3d 1255 (2002)). Romero does not support the State's contention. The Romero court held an indirect comment on a defendant's right to silence exploited by the State during the course of the trial, including argument, in an apparent attempt to prejudice the defense offered by the defendant, is analyzed under the constitutional harmless error standard. Id., citing, State v. Easter, 130 Wn.2d at 236.

The prosecutor's remorse argument was an apparent attempt to prejudice Davis' defense, which in the context of a death penalty sentencing trial is an appeal for mercy based on mitigating evidence. The purpose of the remorse argument was to convince the jury it should not

show Davis any mercy and spare his life because he had no remorse for the killing. Thus, the improper argument is analyzed under the constitutional harmless error standard. Under that standard, the State has the burden to show beyond a reasonable doubt the jury would have reached the same result absent the error. Easter, 130 Wn.2d at 242.

The State fails to meet its burden. The improper argument likely led the jurors to condemn Davis to death regardless of the mitigating evidence favoring mercy because he did not testify and express his remorse for the killing. The error was not harmless and requires reversal of Davis' death sentence.

7. DAVIS' SENTENCE VIOLATES THE EIGHTH AMENDMENT AND ARTICLE 1, § 14 OF WASHINGTON'S CONSTITUTION.

a. Eighth Amendment

The State argues Davis has not presented a "true Eighth Amendment claim" because he has not argued (1) that the death penalty statutes fail to provide clear and objective standards to jurors or (2) that Davis belongs to a class of individuals exempted from the death penalty. See BOR at 84. But the Eighth Amendment's guarantee against cruel and unusual punishments is not so narrow.

Certainly "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement

for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988) (citing Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). But the Eighth Amendment is not limited to that concern or to the exemption of certain classes of offenders. Rather, the Eighth Amendment is "interpreted in a flexible and dynamic manner," guarding against certain types of punishment ("torture and the like"), disproportionate punishments, and even the criminalization of certain activities. Gregg, 428 U.S. at 171-172.

In Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the Supreme Court made clear the Eighth Amendment also guards against selective, infrequent, arbitrary, random, and irregular use of the death penalty and the absence of any meaningful basis of distinguishing between those cases in which it is imposed and those in which it is not. 408 U.S. at 245, 248-249 (Douglass, J., concurring); at 266, 274-277, 293 (Brennan, J., concurring); at 309-310 (Stewart, J., concurring); at 313 (White, J., concurring). These concerns are not limited to a sentencer's discretion. Application of the penalty can be "freakish and wanton" for many reasons, including prosecutorial discretion.

In Gregg, a majority of the Court rejected the notion that prosecutorial discretion rendered death penalty schemes unconstitutional. Gregg, 428 U.S. at 199 (three judge plurality opinion); Gregg, 428 U.S. at 224-225 (three judge concurrence). On this point, the concurring judges said:

> Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. . . .

Gregg, 428 U.S. at 225 (White, J., concurring).

Drawing on this analysis, in State v. Rupe this Court rejected an argument that Washington's death penalty scheme did not adequately guard against arbitrary prosecutorial discretion:

> as Justice White explained in his concurrence in *Gregg*, the grant of discretion to prosecutors does not result in a standardless death penalty statute. The courts may assume that prosecutors exercise their discretion in a manner which reflects their judgment concerning the seriousness of the crime or insufficiency of the evidence. Consequently, the prosecutor's decision not to seek the death penalty, in a given case, eliminates only those cases in which juries could not have imposed the death penalty. We believe this analysis accurately portrays the function prosecutorial discretion plays in our death penalty statute. This discretion is not unconstitutional.

Rupe, 101 Wn.2d at 700. In State v. Cross, 156 Wn.2d 580, 625, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006), this Court cited to this passage in Rupe in rejecting Cross' argument that prosecutors had too much discretion to decide eligibility for the death penalty. See also State v. Yates, 161 Wn.2d 714, 791, 168 P.3d 359 (2007) (finding prosecutorial discretion in RCW 10.95.040 did not violate equal protection and not contrary to Furman and Gregg), cert. denied, 128 S. Ct. 2964 (2008).

While this Court has previously rejected Eighth Amendment challenges to Washington's death penalty scheme, current data demonstrate it is no longer possible to justify why some defendants receive the penalty in Washington and others do not. There is now uneven application of the penalty across the state. And prosecutorial discretion plays a large role. Unless a crime is committed in Pierce or King County, the defendant is far less likely to face, and in some counties cannot face,

the death penalty for aggravated murder. The assumption in Gregg, Rupe, Cross, and Yates that prosecutors exercise their discretion based on the same factors jurors use when contemplating death is no longer valid. Money is now a critical factor.

In none of this Court's prior decisions did this Court have the benefit of the WSBA report and other current information on the death penalty in Washington. That information demonstrates the number of death sentences sought and/or imposed is decreasing at the same time fewer counties can afford to seek the penalty. WSBA Report, at 18-24, 32-33. Prosecutors have conceded that the costs involved influence their decisions whether to seek the penalty. Lise Olson, One Killer, two standards, Seattle Post-Intelligencer, August 7, 2001.[11]

Of course, prosecutors' unwillingness or inability to take on the costs of seeking the death penalty are not solely to blame for arbitrary application of the penalty in Washington. As discussed in the opening brief, even in the few counties still able to afford the penalty, there is no rational distinction between those who are sentenced to death and those

[11] It is unimaginable the Eighth Amendment would permit jurors to decide whether a defendant should live or die based on the resulting cost to the particular county. How, then, can the Eighth Amendment allow prosecutors to decide an individual's fate on this basis?

who are spared. This state's most prolific killers are spared. See BOA at 111-112.

The Eighth Amendment ensures that punishment is not imposed in an arbitrary or capricious manner. Washington's statutory scheme violates this guarantee. The death penalty in Washington now depends on geography and money. And even in those few states that can still afford to pursue it, it is impossible to rationally distinguish those sentenced to die and those sentenced to life without the possibility of parole.

b. Article 1, § 14

This Court has already recognized that "the state constitutional provision barring cruel punishment is more protective than the Eighth Amendment." State v. Thorne, 129 Wn.2d 736, 772, 921 P.2d 514 (1996) (citing State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980)); see also Bartholomew II, 101 Wn.2d at 639 (for death penalty statute, Court not constrained by Eighth Amendment when interpreting broader protections under article 1, § 14). As this Court recognized in Thorne, the one exception is the "unique facts" of State v. Dodd, 120 Wn.2d 1, 838 P.2d 86 (1992), where this Court held the Washington Constitution does not bar a waiver of appellate rights any more than the Eighth Amendment does. Thorne, 129 Wn.2d at 773 n.10; Dodd, 120 Wn.2d at 21-22.

In its brief, the State points out that Fain and Bartholomew predate State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). BOR, at 86 n.15. But Thorne postdates all of them, reaffirms the broader protections of article 1, § 14, and limits Dodd to its facts. See also State v. Roberts, 142 Wn.2d 471, 506, 14 P.3d 713 (2000) (noting this Court's "repeated recognition that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment"). The State has not presented any argument under the Gunwall factors that this Court should retreat from this long-held position.

The State cites to eight cases in which this Court found no violation of article 1, § 14. See BOR at 86-87. Five of them involve claims entirely different from Davis' claim. See State v. Gentry, 125 Wn.2d 570, 631, 888 P.2d 1105 (constitutionality of victim impact evidence), cert. denied, 516 U.S. 843 (1995); Dodd, 120 Wn.2d at 20-22 (constitutionality of voluntary appeal waiver); State v. Lord, 117 Wn.2d 829, 915-916, 822 P.2d 177 (1991) (whether statute imposes a "mandatory death penalty"), cert. denied, 506 U.S. 856 (1992); Matter of Harris, 111 Wn.2d 691, 701, 763 P.2d 823 (1988) (whether statute sufficiently reliable for determination that death is appropriate punishment), cert. denied, 490 U.S. 1075 (1989); State v. Rupe, 101 Wn.2d at 697-99 (whether death penalty is per se unconstitutional). In the sixth case, it is impossible to

determine the nature of the defendant's argument. See State v. Jeffries, 105 Wn.2d 398, 428, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986). In the seventh – State v. Campbell, 103 Wn.2d 1, 31-35, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985) – this Court considered the Fain criteria, but that decision is now 25 years old and does not reflect, under current trends and circumstances, whether use of the penalty has become "cruel punishment."

The State's eighth case is State v. Yates. While more recent, it contains no analysis under article 1, § 14. Citing Dodd, this Court merely indicated that if Yates could not demonstrate an Eighth Amendment violation, he could not demonstrate a violation under article 1, § 14. Yates, 161 Wn.2d at 792. This reliance on Dodd is confusing because, as previously noted, that case merely dealt with voluntary waiver of a portion of the right to appellate review, and this Court has identified that circumstance as the lone exception to article 1, § 14's greater protections. See Thorne, 129 Wn.2d at 772-773 n.10 (no greater protection "under the unique facts of that particular case."). Under Fain, Bartholomew, and Thorne, our state constitution provides even greater protections than the Eighth Amendment.

Even if this Court were to find that article 1, § 14 provides the same protections as the Eighth Amendment under these circumstances, it

should examine the issue under the Fain factors, as it has done before. Doing so would provide a look at Davis' death sentence from a different vantage. Whereas the focus of his Eighth Amendment claim is arbitrary and random application of the penalty (there is no way to rationally distinguish between those sentenced to death and those not), his focus under the Fain factors is proportionality (nature of the offense, legislative purpose, punishment in other jurisdictions, and punishment for similar offenses demonstrate the sentence to be cruel).

Finally, seeking to identify a procedural bar to this Court's consideration of Davis' claim, the State argues that he has not raised an issue meeting the requirements of RAP 2.5(a), which permits parties to raise, for the first time on appeal, "manifest error affecting a constitutional right." See BOR at 88-90.

The State argues a finding that Davis' death sentence is unconstitutional under article 1, § 14 would have no "practical and identifiable consequences in the trial of his case" and therefore would not be manifest error. BOR at 89. Since the whole point of Davis' trial was to determine whether he would be sentenced to death, a finding that his death sentence is unconstitutional would have a very great impact indeed, since it would require reversal of that sentence. Challenges to the constitutionality of a sentence fall under RAP 2.5(a) and are properly

raised for the first time on appeal. See State v. Elmore, 154 Wn. App. 885, 228 P.3d 760, 766-67 (2010) (double jeopardy challenge). Moreover, even where an error does not satisfy RAP 2.5(a), "[i]n the context of sentencing, established case law holds that an illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999).

The State also argues that because it has moved to strike the appendices to Davis' opening brief, the facts necessary to decide his constitutional challenge are not in the record, thereby denying him the ability to show a manifest error. BOR at 89. But this Court has not stricken those appendices, and for the reasons discussed in Davis' answer to the State's motion, the information included in his opening brief is properly considered. It is critical that this Court consider the latest information on use of the death penalty in Washington and abroad.

c. Important Events Since The Filing Of Davis' Opening Brief

Three events that occurred after Davis filed his opening brief merit discussion. First, as noted by the State in its response brief, the Death Penalty Information Center filed its report for 2009. See BOR at 90 n.17. That report reveals that 2009 marked "the fewest death sentences since the death penalty was reinstated in 1976," having fallen 63% in the past

decade. DPIC 2009 Report at 1.[12] Consistent with the discussion in Davis' opening brief, money is a factor: "The costs for pursuing even a single capital case caused some prosecutors to reconsider seeking the death penalty, and may have contributed to the decline in death sentences in 2009." Id. at 2. "As the country faced an economic crisis this year, the death penalty was increasingly seen as an enormously expensive and wasteful program with no clear societal benefits." Id. at 3.

Second, the American Law Institute voted overwhelmingly to withdraw that portion of the Model Penal Code addressing capital punishment.[13] The Death Penalty Information Center noted this significant event in its 2009 report:

> The American Law Institute withdrew the part of its Model Penal Code concerned with capital punishment because of the "current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." ALI's recommendations for making the death penalty less arbitrary had been adopted in 1962 and were cited extensively by the U.S. Supreme Court in *Gregg v. Georgia* in 1976, the decision that allowed a revised death penalty to be reinstated. Many states mirrored ALI's model in their statutes. Now that legal framework is no longer supported by the very organization that proposed it because the guidelines have failed to produce the fairness it sought to ensure.

---

[12] **http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf**

[13] **http://www.ali.org/_news/10232009.htm.**

DPIC 2009 Report, at 6. The significance of this event cannot be overstated. The finest experts tasked with ensuring the death penalty is applied fairly have thrown up their arms in recognition this goal cannot be achieved under current conditions.

Third, citing the high cost of seeking the death penalty, the Spokesman-Review has come out against the penalty and in favor of life sentences. Citing a recent case where Spokane and Stevens Counties fought over which county should prosecute a death penalty case (each county wanted the other to bear the costs), the paper noted that these cases can lead to financial insolvency for smaller counties and stated:

> While cost shouldn't be the only concern in prosecutions, it's become clear that a death penalty charge imposes a financial burden that isn't worth it. That's also true of larger counties, especially as they try to dig themselves out of deep budgetary holes. It can mean more pressure to reach plea agreements in other cases or employee layoffs or cutbacks in service.

Death penalty cases costly; instead, seek life sentences, Spokesman-Review, November 3, 2009. The paper noted that "Spokane County dodged a bill of $1 million or more when it decided against the death penalty for convicted serial killer Robert Lee Yates Jr. The same is true with Kootenai County [Idaho] in the case of Joseph Duncan." Id.

These events are further proof of the diminishing use of the penalty, that there is no mechanism for preventing arbitrary and random

application of the penalty, and that money – rather than the potential merit of seeking death in a particular case – has become a critical factor in who will live and who will die in Washington. This is unacceptable under the Eighth Amendment and article 1, § 14.

8. DEPARTMENT OF CORRECTIONS POLICY 490.200 IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY UNDER ARTCILE 2, § 1 OF WASHINGTON'S CONSTITUTION.

Although Davis maintains the current record is sufficient to decide this claim, he agrees with the State's comment that he will reap the benefit of any decision in Brown and Gentry v. Eldon Vail, et. al., No. 83474-1, and can also challenge the validity of the delegation in a personal restraint petition and/or separate lawsuit. See BOR at 103. The State notes that DOC may have recently changed its three-drug protocol to a one-drug protocol. BOR at 100 n.21. Even if true, the Legislature has not amended RCW 490.200. Thus, the problem remains: insufficient procedural safeguards to prevent arbitrary administrative action and abuse of discretionary power.

9. CUMULATIVE ERROR DENIED DAVIS HIS RIGHT TO A FAIR SENTENCING PROCEEDING.

Davis has nothing new to add in response to the State's argument other than to reiterate that the multiple serious errors at the sentencing trial, which impacted the judge, the evidence, and the legal standards to be applied, necessarily had a material impact on the jury's verdict. See BOA at 140-141.

10. MANDATORY STATUTORY REVIEW.

Davis has nothing new to add in response to the State's argument. For the reasons discussed in the opening brief, Davis' sentence is excessive and disproportionate, there was insufficient evidence to support the death verdict, and the sentence was the product of passion and prejudice. See BOA at 141-150.

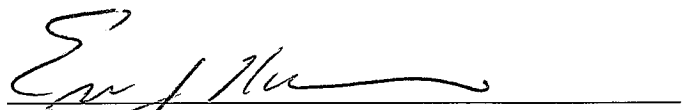
B. CONCLUSION

For all of the reasons discussed in the opening brief and this brief, Davis respectfully asks this Court to vacate his death sentence.

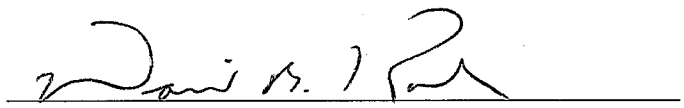
DATED this 27th day of May, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ERIC J. NIELSEN
WSBA No. 12773



DAVID B. KOCH,
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	NO. 80209-2
	)	
CECIL DAVIS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402

[X] CECIL DAVIS
DOC No. 920371
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MAY, 2010.

x Patrick Mayovsky